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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92058893
Party	Defendant Branch, Cahleb, Jeremiah LLC
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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

)	
MAYWEATHER PROMOTIONS, LLC)	
)	
Petitioner,)	
)	Cancellation No: 92058893
v.)	
)	Registration Number: 3565960
Branch, Cahleb, Jeremiah, LLC)	
)	
)	
Registrant)	
)	

REGISTRANT’S REPLY IN SUPPORT OF MOTION TO DISMISS

Registrant, Branch, Cahleb, Jeremiah, LLC, (“Registrant”) submits this reply brief in response to Petitioner, Mayweather Promotions, LLC’s (“Petitioner”) Opposition to Registrant’s Motion to Dismiss (“Opposition”).

The Opposition fails to contradict a simple but critical fact the supports the Motion to Dismiss: the claims in the Petition to Cancel are futile. Rather, the Opposition asserts “facts” that are patently inaccurate and relies on conclusions that are unsupported by any facts. Therefore, nothing in the Opposition changes the conclusion that the Petition fails to (1) allege sufficient accurate factual content that plausibly shows Petitioner is entitled to relief and (2) fails to contain facts pleaded with sufficient particularity to support a fraud claim. For these reasons, both claims in the Petition to Cancel should be dismissed. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *W.R. Grace & Co. v. Arizona Feeds*, 195 U.S.P.Q. 670, 672 (Comm’r Pats. 1977).

I. The Opposition Ignores Facts that Contradict the Abandonment Claim

Petitioner's abandonment claim is based on unsupported conclusions that are contradicted by publicly available evidence of Registrant's continuing and current use of the MONEY POWER RESPECT ENTERTAINMENT mark ("MPRE Mark") for the online retail store services for clothing. Yet, the Opposition ignores those facts and mischaracterizes the record, asserting that no evidence of use exists when evidence of actual use exists in the PTO database and is available from independent sources available to Petitioner.

The Opposition fails to identify any facts that support Petitioner's claim of abandonment. Rather, the Opposition states that "the simple fact is that Registrant has not used its mark in connection with 'online retail store services in the field of clothing' from 2009 until at least March of 2014." See Opposition at 8. Aside from being absolutely incorrect (as explained in more detail below), this affirmative "fact" is not what the Petition to Cancel alleges; rather Petitioner has alleged "upon information and belief, these services have not been offered under Registrant's Mark for more than three consecutive years."

The Opposition ignores ample and publicly available evidence contradicting the bald assertions offered as support for the abandonment claim. That evidence, proving Registrant's use of the MPRE Mark includes:

- (1) Archived images of Registrant's website, www.mprent.net, from 2009 through 2011 that are currently available on the independent website archival database, www.archive.org ("Wayback Machine"); and
- (2) Registrant's current version of the www.mprent.net website showing that Registrant is using the MPRE Mark for the online sale of clothing.

This evidence is, and has been, available to Petitioner since before Registrant filed its Motion to Dismiss. Both the Internet archive and Registrant's website are, and have been, available to the general Internet users.

For whatever reason, Petitioner has opted to ignore this evidence and to direct the Board to ignore all attachments to Registrant's Motion to Dismiss. To do so, however, is to ignore reality and to allow these erroneous allegations to propel the parties into a costly and frivolous opposition proceeding.

A party cannot create facts in order to escape a motion to dismiss and Petitioner should not be allowed to ignore all of the readily available evidence of use of the MPRE Mark in its pursuit of its abandonment claim. *See Phoenix Airway Inn Assoc. v. Essex Financial Services, Inc.*, 741 F. Supp. 734, 736 (N.D. Illinois, 1990) ("counsel should not be permitted -- without reasonable investigation -- to file pleadings, motions, or other papers, and then, only if challenged (and after imposing substantial costs on the opposing party), be allowed to scramble to find facts and law justifying his original filing.").

The Opposition mischaracterizes the record, as well. The specimen offered by Registrant to the U.S. Patent and Trademark Office during the prosecution of its application for the MPRE Mark included two images filed with its Statement of Use: (1) an image of a t-shirt, bearing an advertisement for the domain name of the website offering Registrant's online retail clothing services, and (2) a print advertisement for Registrant's services. Both were accepted by the Trademark Office as being sufficient to support registration of the MPRE Mark.

Yet, the Opposition asserts that the image of the t-shirt containing a website address printed on it does not constitute evidence of use of the mark for retail store services for clothing, ignoring the fact that the t-shirt image advertised the online retail store services, available at the

website address printed on the t-shirt. Instead, the Opposition makes the unsupported assertion that Registrant “never used” the mark. If anything, however, the specimen proves that the MPRE Mark was in use at the time the Statement of Use was filed and that the abandonment claim (and fraud claim) is simply not plausible.

The Opposition fails to contradict the fact that the allegations contained within the Petition to Cancel are insufficient support for an abandonment claim, even if the Board does not consider the evidence filed in support of the Motion to Dismiss. Simply reiterating the elements of a cause of action for abandonment is not enough to survive a motion to dismiss. *See Iqbal*, 556 U.S. 662, 129 S. Ct. at 1949 (holding that threadbare recitals are not sufficient to state a plausible claim); *Otto Int’l, Inc. v. Otto Kern GmbH*, 83 U.S.P.Q.2d 1861, 1863 (TTAB 2007).

II. The Abandonment Claim is Futile

In effect, the Opposition confirms that Petitioner’s abandonment claim is futile. The Opposition merely argues that the claim is properly alleged. And this reveals that Petitioner cannot succeed on its abandonment claim when there is available and uncontroverted (and incontrovertible) evidence that Registrant is using the challenged mark.

In order to sustain an abandonment claim, a challenge must allege facts showing either a presumption of non-use or non-use with an intent not to resume use. *See Otto Int’l, Inc.* 83 U.S.P.Q.2d at 1863. Here, however, there cannot be a presumption of abandonment. The Petition to Cancel does not contain any allegation of actual fact concerning any non-use for a requisite three year period. Instead, Petitioner surmises that “upon information and belief, these services have not been offered... for more than three consecutive years.” This is pure speculation.

In addition, Petitioner cannot establish nonuse with an intent not to resume use. The Petition simply asserts, “upon information and belief, [that] Registrant has no intent to resume use of the mark,” although there is no factual basis for this conclusory allegation. In fact, Petitioner cannot prove an intent not to resume use because Registrant is currently and publicly using the MPRE Mark for the services at issue in this proceeding.

In sum, Petitioner’s abandonment claim is futile. See *Herb Reed Enters. v. Florida Entment. Mgmt.*, 736 F.3d 1239, 1247-1248 (9th Cir. 2013)(“Non-use requires ‘complete cessation or discontinuance of trademark use,’ where ‘use’ signifies any use in commerce and ‘includes the placement of a mark on goods sold or transported.’”)(citing *Electro Source, LLC v. Brandess-Kalt-Aetna Grp., Inc.*, 458 F.3d 931, 936, 938 (9th Cir. 2006). Even a single instance of use is sufficient against a claim of abandonment of a mark if such use is made in good faith. *Id.* Therefore, the ongoing use of a mark will preclude a finding that the mark has been abandoned though nonuse. See *Wells Fargo & Co. v. ABD Ins. & Fin. Servs., Inc.*, No. 13-15625, 2014 WL 806385, at *2-3 (9th Cir. Mar. 11, 2014).

III. The Fraud Claim is Not Pleaded with Particularity

Petitioner’s claim of fraud is premised merely on Petitioner’s “good faith belief” that Registrant was not using its MPRE Mark on all of the services listed in the registration at the time it filed its Statement of Use. That’s it. That “good faith” belief is not good enough to survive the Motion to Dismiss.

Petitioner’s fraud claim is rife with conclusions, but bereft of clear facts. To survive dismissal, a fraud claim must be pled with particularity and Petitioner cannot meet this heightened standard. See *Asian and Western Classics B.V. v. Selkow*, 92 USPQ2d 1478, 1479

(TTAB 2009) (allegations based on information and belief do not meet the Fed. R. Civ. P 9(b) pleading standard). A pleading that only raises “the mere possibility” that evidence of fraud may be discovered is not pleading fraud with particularity. *Id.*

In defense of its inadequate fraud claim, Petitioner has asserted in the Opposition that Registrant could not have reasonably believed that the image of the t-shirt Registrant submitted to the Patent and Trademark Office supported the alleged use of the MPRE Mark, and therefore Registrant made a material misrepresentation to the USPTO, with the intent to deceive. Again, there are no facts to support this statement and this argument ignores the USPTO filing requirements.

In fact, the PTO record itself reveals that Respondent used, at that time, a t-shirt advertising the domain name for its online retail store and that single, unchallenged specimen is and was, sufficient to support registration of the MPRE Mark. An applicant seeking a trademark registration need only to submit one specimen per International Class, and Petitioner is not challenging the veracity of the specimen offered for the “advertising services” in Class 35. See Trademark Manual of Examining Procedure 904.

Indeed, there is no interpretation of Petitioner’s fraud claim that would satisfy the pleading standard, and it should be dismissed.

IV. Petitioner Should Not Be Permitted an Opportunity to Amend the Petition to Cancel

Petitioner should not be permitted to file an amended pleading. More than 21 days has passed since Registrant filed its Motion to Dismiss, and any amendment would be futile. *See Institut National des Appellations d'Origine v. Brown-FormanCorp.*, 47 USPQ2d 1875, 1896 (TTAB 1998) (amendment would be futile because opposer cannot prevail on claim as a matter of law);

Petitioner's claims are fatally defective. The publicly available evidence demonstrates that Registrant was using its mark at the time of registration and that Registrant had no intention to abandon its mark. Likewise, Petitioner's fraud claim is based solely on the untenable assertion that Respondent was not offering its online retail store services at the time of its Statement of Use when, in fact, evidence of such use is available in the PTO records.

Conclusion

In order for Petitioner to file adequate claims of abandonment and fraud, it would have to ignore all of the publicly available evidence of use of the MPRE Mark, already disclosed to Petitioner. Accordingly, Registrant respectfully requests that the Trademark Trial and Appeal Board enter judgment in its favor, and against Petitioner and dismiss the cancellation proceeding with prejudice.

Respectfully submitted

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of September, 2014, Registrant's Reply In Support Of Motion To Dismiss was served by e-mail and first-class mail, postage prepaid, on counsel for Petitioner at the following address:

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